Supreme Court, U.S.
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No. 98-336

In The

Supreme Court of the United States

October Term, 1997

JOE B. RITCHEY,

Petitioner,

v.

THE UPJOHN COMPANY AND WILLIAM DEMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to consider whether the one-year limit on removal under the second paragraph of 28 U.S.C. § 1446(b) – for cases not initially removable – also applies to the first paragraph of Section 1446(b), when the only two federal circuit courts to have addressed the question have each unanimously concluded that it does not.

2. Whether this Court should grant certiorari to consider the Ninth Circuit's application of California civil procedure and statute of limitations law in deciding, based on the particular procedural history and facts of this case, that petitioner fraudulently joined nondiverse parties against whom he had no possibility of prevailing in an effort to defeat diversity jurisdiction.

CORPORATE DISCLOSURE STATEMENT

The Upjohn Company makes the following disclosure pursuant to Supreme Court Rule 29.6:

On November 2, 1995, a merger took place between The Upjohn Company and Pharmacia AB. In June of 1996, the name of The Upjohn Company was changed to Pharmacia & Upjohn Company which remains incorporated in the State of Delaware. Pharmacia & Upjohn Company is the wholly owned subsidiary of Pharmacia & Upjohn, Inc., which is a publicly owned corporation also incorporated in Delaware. There are no nonwholly-owned subsidiaries.

Stanford Health Services makes the following disclosure pursuant to Supreme Court Rule 29.6:

Stanford Health Services is not a publicly owned corporation or a subsidiary or affiliate of a publicly owned corporation, and has issued no shares to the public.

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Supreme Court Rule 29.6 ii

STATEMENT OF THE CASE

I. FACTS AND PROCEDURAL HISTORY

Petitioner Joe B. Ritchey is a lawyer. In May 1984 he was arrested for bribing a witness in a criminal prosecution. This resulted in convictions on two felony counts in September 1986. His license to practice law was revoked.

After his convictions, Ritchey began working with a criminal appellate specialist to develop grounds for a new trial and an appeal. They began searching for excuses to explain away Ritchey's criminal conduct. In December 1986 Ritchey filed a motion for a new trial which blamed Halcion®, a prescription medication Ritchey was taking at the time he sought to corrupt the State's prosecution. The motion was denied. Ritchey was sentenced to jail and was fined. The California Court of Appeal affirmed one felony conviction and reversed the other (the reversal had nothing to do with Halcion®; Ritchey's statement in the Petition to the contrary is flatly wrong). Ritchey's license to practice law ultimately was reinstated, seven years after he was arrested.

On March 12, 1990 Ritchey filed a lawsuit against The Upjohn Company, the manufacturer of Halcion®, in the United States District Court for the Northern District of California (*Ritchey I*). That action sought compensatory and punitive damages, under a variety of theories, arising out of his use of Halcion® and his criminal conduct. After substantial discovery, briefing, and argument, the District Court found that Ritchey possessed knowledge in August 1988 – at the time he was preparing the appeal from his criminal conviction in which he argued that Halcion® caused his criminal conduct – sufficient, under

California law, to trigger the running of California's one-year statute of limitations. As Ritchey's complaint was not filed until nearly two years after he obtained the requisite knowledge, the District Court entered judgment in favor of Upjohn on November 1, 1993. Ritchey moved for reconsideration; the motion was denied.

After the District Court denied Ritchey's motion for reconsideration, Ritchey secretly filed another action against Upjohn in a California state court (*Ritchey II*) on January 3, 1994. *Ritchey II* alleged ***exactly*** the same injury, the same damages, and the same claims alleged in *Ritchey I*. The ***only*** change was the naming of a non-diverse defendant – the "co-conspirator" physician who is alleged to have participated in the approval process for Halcion®.[1]

Ritchey did not serve *Ritchey II*. He let it sit – undiscovered by Upjohn – while he pursued an appeal of the dismissal of *Ritchey I* in the Ninth Circuit. The Ninth Circuit affirmed the dismissal of *Ritchey I* on June 8, 1995, and subsequently denied Ritchey's petition for rehearing.

On December 29, 1995, just after the Ninth Circuit denied further review, following a second motion for reconsideration, Ritchey mailed the complaint in *Ritchey II* to Upjohn (he personally served the physician the same day). Upjohn received the complaint on January 9, 1996.

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[1] Stanford Health Services was not named in the complaint but purportedly was later substituted and served as a "Doe" defendant. Although Stanford was never properly served, it appeared voluntarily.

Upjohn removed *Ritchey II* to the United States District Court on January 29, 1996, twenty days after receiving the initial pleading.[2] At the same time, Upjohn moved to dismiss based upon the previously-adjudicated fact that Ritchey's claims were barred by the statute of limitations.

Rather than respond to the motion to dismiss, Ritchey moved to remand *Ritchey II* to state court on the ground that there was no diversity of citizenship. Upjohn opposed, demonstrating that the physician was a fraudulently-joined defendant because Ritchey's claim against him was barred – as a matter of law – by the California statute of limitation under the District Court's rulings in *Ritchey I*.

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[2] Petitioner's claim (Pet. 4 & n.1) that the notice of removal was not filed until "33 days after receipt by agents of Upjohn" is unsupported and unfounded. In any event, as the Court of Appeals held, Pet. App. 3 & n.3, petitioner waived any objection on this ground by failing to properly raise it both in the District Court and the Court of Appeals. Petitioner asserts without citation that failure to file the petition for removal within 30 days is a nonwaivable jurisdictional defect, but he is wrong. *See, e.g., Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985) ("The time limitations for removal is not jurisdictional . . . and may be waived."); *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983) (same). Moreover, "the time limits will be ignored when removal is sought on the ground that some defendants have been fraudulently joined to prevent removal." 14A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3732 at 530. Although petitioner attempts to raise this issue in the body of his petition, it is not included in the Questions Presented, and petitioner has made no effort whatever to argue that it is certworthy.

The District Court denied Ritchey's motion to remand and granted Upjohn's motion to dismiss, holding that (1) Upjohn's removal was timely, and (2) the doctrines of *res judicata* and collateral estoppel barred Ritchey's attempt to relitigate the statute of limitations issue. The Ninth Circuit affirmed on April 3, 1998, and denied Ritchey's petition for rehearing on May 27, 1998.

This petition for a writ of certiorari followed.

THE PETITION SHOULD BE DENIED

I. THE ONE-YEAR REMOVAL ISSUE DOES NOT WARRANT REVIEW

Ritchey's first issue argues that 28 U.S.C. § 1446(b) absolutely prohibits removal of an action on diversity grounds more than one year after a complaint is filed, even if the plaintiff has not revealed the existence of the lawsuit to any other party, and has not served the complaint on any defendant. Under Ritchey's theory, a plaintiff can unilaterally prevent removal of an otherwise properly removable case through stealth and patience. Thus, in this case Ritchey argues that notwithstanding (1) his concealment of the filing of *Ritchey II* from Upjohn for more than ***two years*** and (2) Upjohn's removal of *Ritchey II* just twenty days after receiving the complaint, the removal was barred by Section 1446(b).

Petitioner's request that the Court consider this issue should be denied for two reasons. First, there is no conflict among the circuits. Second, the Ninth Circuit's ruling was plainly correct.

A. THERE IS NO CONFLICT AMONG THE CIRCUITS

As discussed below, 28 U.S.C. § 1446(b) provides that an action may be removed (1) within thirty days after defendant receives the complaint, or (2) if the complaint is not removable upon receipt, within thirty days after the complaint becomes removable so long as this occurs within one year of the filing of the complaint.

The Ninth Circuit ruled that the plain meaning of Section 1446(b) is that the one-year limitation period applies only to the second circumstance; it does not apply to a case – such as this one – where the defendant is entirely unaware of the existence of the lawsuit (much less has the defendant received the complaint) for more than a year after the action was filed. The Ninth Circuit rejected Ritchey's contorted effort to read Section 1446(b) to impose an absolute one-year limit to removal, regardless of whether plaintiff has actively concealed the existence of the action from the defendants. (Pet. for Cert., App. 6-8.)

The only other circuit court to squarely address this issue is the Fifth Circuit. See *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873 (5th Cir. 1998). The Fifth Circuit's analysis is entirely consistent with the Ninth Circuit's analysis here:

> When read in its entirety with these [statutory construction] precepts in mind, Section 1446 requires that we interpret the one-year limitation on diversity removals as applying only to the second paragraph of that section, i.e., only to cases that are not initially removable. . . . Courts applying the one-year limitation to the first

> paragraph can do so only by distorting its ordinary meaning.

(*Id.* at 886.)

Both the court below and the Fifth Circuit in *Deshotel* recognized that some district courts had done just that and had reached results inconsistent with their holdings. The two appellate court decisions, however, largely resolved the confusion among the district courts: every one of the conflicting district court decisions cited by the Fifth Circuit in *Deshotel* was from either the Ninth or Fifth Circuits, and accordingly is no longer good law, given the circuit court decisions. Similarly, six of the seven conflicting decisions cited by the court below (Pet. App. 9) were from within the Ninth Circuit, and thus have been superseded by the decision in this case. Whatever conflict had existed among the district courts has thus been largely dissipated by uniform court of appeals decisions; there is no need for intervention by this Court.[3]

B. THE NINTH CIRCUIT'S DECISION WAS CORRECT

The removal statute, 28 U.S.C. § 1446(b), provides:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or

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[3] The commentators are also in agreement with the uniform position of the circuit courts. *See, e.g.*, 14A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3732, at 284 (Supp. 1997).

> otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 [diversity] of this title more than 1 year after commencement of the action.

The Ninth Circuit adopted the analysis of *Zogbi v. Federated Dept. Store*, 767 F.Supp. 1037 (C.D. Cal. 1991). In *Zogbi*, the plaintiff filed suit in California state court, but waited almost three years before serving two California defendants. A Delaware defendant, although not served, received a copy of the complaint at the same time and promptly removed the case to federal court on the basis of diversity jurisdiction. The plaintiff attacked the removal as improper because it was taken more than one year after its commencement. The *Zogbi* court held that the California defendants were fraudulently joined and that removal was timely. *Id.* at 1042.

Zogbi applied basic principles of statutory construction, holding that "the one year limitation in section 1446(b) only applies to cases removed on the basis of something other than the initial pleading." *Id.* at 1040.

The court reasoned that "[t]he 'except that . . . ' clause cannot reasonably be read as also modifying the first sentence/paragraph of section 1446(b)." *Id.* at 1039.

The court further reasoned that if Congress had intended to prevent removal in all diversity cases commenced more than one year prior to removal, it could easily have worded the statute to accomplish that result. *Id.* "For example, Congress could have placed the 'except that . . . ' clause at the end of the first paragraph of section 1446(b) as well as at the end of the second paragraph." *Id.* at 1040 n.4. In addition, the court noted that "[t]he rubric of strict construction of removal statutes is not carte blanche for disregarding the language and structure of the statute at issue." The court cautioned against finding "loopholes" to avoid federal jurisdiction where such loopholes are not justified by the language of the statute. *Id.* at 1040.

The *Zogbi* court also considered the legislative history of § 1446(b), finding that "Congress was concerned with removal of cases commenced in state courts that had progressed towards trial. . . . Thus, where developments in a non-removable case render it removable, Congress has determined that such a case should not be removed more than one year after its commencement." *Id.* (citation omitted). As the legislative history of § 1446(b) states:

> Subsection (b)(2) amends 28 U.S.C. § 1446(b) to establish a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court. The result is a modest curtailment in access to diversity jurisdiction. The amendment addresses problems

> that arise from a change of parties as an action progresses toward trial in state court. . . . Removal late in the proceedings may result in substantial delay and disruption.

H.R.Rep. No. 889, 100th Cong., 2d Sess. 71-73 reprinted in 1988 U.S. Cong. & Admin. News 5982, 6031-6034.

Zogbi is consistent with this Court's holding in *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92 (1898). There, the Court discussed the importance of a nonresident's right of removal, making clear that artful maneuvering and abuse of procedural rules should not be permitted to abridge that right. In permitting the defendant to file an untimely petition for removal, the Court held:

> The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond [defendant's] control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right. . . .

Id. at 100-101.

Citing the *Powers* decision, among others, the court in *Saunders v. Wire Rope Corp.*, 777 F.Supp. 1281, 1284-85 (E.D.Va. 1991), read section 1446(b) in a manner consistent with its plain language and intent – it held that the one year bar applied "only in cases where substantial progress has been made in state court" such that removal would delay the case and erase progress. The court noted that the right to removal is a "substantial right of the

non-resident defendant," which a court should not permit crafty tactics to deprive or abridge. *Id.* at 1284 (citing *Heniford v. American Motors*, 471 F.Supp. 328, 335 (D.S.C. 1979) (removal of case permitted after plaintiff craftily delayed dismissal of non diverse defendant until closing argument in an attempt to deprive nonresident defendant of right to removal)).

The *Saunders* court noted that any other holding would do violence to section 1446(b), undermine congressional intent, and fly in the face of *Powers*, stating that

> . . . removal in the present case should be upheld. Otherwise, the plaintiffs, by failing to serve the defendants and hereby move the case along, have earned the distinction of having devised a game plan for circumventing removal. A resident plaintiff, who desires to pin down a nonresident corporate defendant in state court, merely must delay service of process . . . until nearly a year has expired. In such manner, the nonresident defendant be totally deprived of its historical right to removal, although no substantial progress in state court has been made.

Id.

Similarly, in *Greer v. Skilcraft*, 704 F.Supp. 1570, 1582 (N.D. Ala. 1989), the court held:

> The one year bar added to the end of the second paragraph of § 1446(b) . . . applies whenever the second paragraph of § 1446(b) is triggered; *i.e.*, 'if the case stated by the initial pleading is not removable.' In short, the second paragraph of amended § 1446(b) provides that for cases not removable on the basis of the initial complaint there are two separate and independent time

> limits: (1) the Notice of Removal must be filed within 30 days from the receipt of a jurisdiction-creating document in the case; and (2) if removal is based on diversity of citizenship, the Notice of Removal must also be filed within one year from the commencement of the action.

By adding the one-year limit to the second paragraph of section 1446(b), Congress intended only a "modest curtailment" in access to federal courts on the basis of diversity jurisdiction – it certainly did not mean to create a loophole that would swallow the rule, allowing plaintiffs to use procedural games to deprive diverse defendants of a substantial and historical right. The plain language of section 1446(b) and the intent of Congress require application of the one-year limit only to those cases in which the initial pleading is not removable. Application of the one-year limit to the first paragraph of section 1446(b), where it does not appear, would encourage plaintiffs to follow Ritchey's lead and delay service to improperly prevent removal on the basis of diversity jurisdiction.

II. THE FRAUDULENT JOINDER ISSUE DOES NOT WARRANT REVIEW

The second and third issues that petitioner asks the Court to review are really the same question: Did the District Court and the Ninth Circuit err in determining that the non-diverse defendants were sham defendants?

This is not a question that warrants the Court's attention. This is a mixed question of fact and California law,

and does not – despite petitioner's hyperbolic rhetoric – implicate any concern of constitutional dimension.

A sham defendant – one who has been joined for the purpose of defeating diversity jurisdiction – may be ignored for the purpose of determining jurisdiction. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 (9th Cir. 1988). A defendant is a sham defendant if the plaintiff cannot establish liability against the party in question. *Farios v. Bexar County Bd. of Trustees*, 925 F.2d 866, 871 (5th Cir. 1991); *Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983), *overruled on other grounds by Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990).

Here, the District Court and the Ninth Circuit ruled that (1) the court had conclusively established the date which began the running of the statute of limitations under California law as to Ritchey in *Ritchey I*; (2) that ruling is binding upon Ritchey in *Ritchey II* (Pet. for Cert., App. 15); (3) under California statute of limitations law, Ritchey's claims against the non-diverse defendants were barred as a matter of law (*id.* at 15-17); therefore, (4) the non-diverse defendants were sham defendants whose presence could not defeat diversity jurisdiction.

Ritchey utterly fails to demonstrate that the Ninth Circuit's ruling raises any issue worthy of review. In none of the cases cited by Ritchey had the federal trial court ***previously*** and ***conclusively*** decided the threshold question in another case involving identical parties and claims – here, the running of statute of limitations – which established beyond question that the non-diverse defendants were sham defendants as a matter of law. This finding did not require the trial court to engage in a

"summary-judgment-type proceeding"; as the Ninth Circuit made plain, fraudulent joinder was clear from the face of the complaint and the Ninth Circuit's previous rulings. (Pet. for Cert., App. 15-17.)

Ritchey's real quarrel is with the Ninth Circuit's analysis of California statute of limitations and civil procedure law, and the application of that law to the unusual facts of this case. This Court need not and should not consider those state-law and fact-bound questions.

CONCLUSION

The petition for certiorari should be denied.

DATED: September 23, 1998

Respectfully submitted,

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